IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32814

RICHARD DRENNON,	)	**2008 Unpublished Opinion No. 395**
	)	
Petitioner-Appellant,	)	**Filed: March 7, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
STATE OF IDAHO,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Respondent.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Gregory M. Culet, District Judge.

Order summarily dismissing successive petition for post-conviction relief, affirmed; order denying motion for appointment of conflict counsel, affirmed.

Richard Drennon, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Chief Judge

Richard Drennon appeals from the district court's summary dismissal of his second successive petition for post-conviction relief and from its denial of his motion for appointment of conflict counsel. We affirm.

I.
FACTS AND PROCEDURE

In 1989, Drennon was convicted of lewd conduct with a minor under the age of sixteen, Idaho Code § 18-1508. This Court affirmed his conviction and sentence. *State v. Drennon*, 126 Idaho 346, 356, 883 P.2d 704, 714 (Ct. App. 1994). In March 1992, Drennon filed a petition for post-conviction relief and that was granted in part.[1] *See State v. Law*, 131 Idaho 90, 952 P.2d

[1] Drennon's criminal case appeal was consolidated with a nearly identical appeal filed by David Law.

905 (Ct. App. 1997). In April 2000, Drennon filed a second petition for post-conviction relief. After conducting a hearing on the state's motion for summary disposition, the district court dismissed Drennon's successive petition. This Court affirmed, *Drennon v. State*, Docket No. 26694 (June 25, 2002) (unpublished) and the remittitur issued in September 2002.

On April 1, 2005, Drennon, acting *pro se*, filed a second successive petition for post-conviction relief. He was appointed a public defender and thereafter filed a motion for the appointment of conflict counsel. The district court issued a notice of intent to dismiss the petition because, among other things, it had not been timely filed. After determining Drennon's petition was frivolous, the court also denied his motion for the appointment of conflict counsel. Over Drennon's objection, the court summarily dismissed his petition on the ground that it was untimely. Drennon now appeals.

II.
ANALYSIS

A. Summary Dismissal of Second Successive Post-Conviction Petition

Drennon contends the district court erred in summarily dismissing his second successive post-conviction petition as untimely, arguing that there is no time limitation for filing successive applications for post-conviction relief. Our review of the district court's construction and application of the time limitation aspects of the Uniform Post-Conviction Procedures Act is a matter of free review. *Martinez v. State*, 130 Idaho 530, 532, 944 P.2d 127, 129 (Ct. App. 1997); *Freeman v. State*, 122 Idaho 627, 628, 836 P.2d 1088, 1089 (Ct. App. 1992). Absent a showing that the statute of limitation should be tolled, the failure to file a timely petition for post-conviction relief is a basis for dismissal of the petition. *Sayas v. State*, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003).

The filing of successive petitions is not, as Drennon suggests, completely unfettered by time restrictions. Normally, a petition for post conviction relief must be filed "any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of proceedings following an appeal, whichever is later." I.C. § 19-4902(a). In regard to successive petitions, which may be filed if there is a sufficient reason why the contentions were not raised initially, I.C. § 19-4908, we have held that the time limit to file an application under the UPCPA is not renewed by the filing of an application for post-conviction relief. *Hernandez v. State*, 133 Idaho 794, 797, 992 P.2d 789, 792 (Ct. App. 1999).

In other words, generally the one-year limitation for bringing an application for post-conviction relief does not begin anew after the determination of each post-conviction application, and thus, successive petitions must normally be filed within the same one-year period governing initial petitions. We did provide for an exception in *Hernandez*, 133 Idaho at 799, 992 P.2d at 794, holding that a successive petition, under certain limited circumstances, would relate back to the initial petition such that if the successive petition was filed within one year from the conclusion of the initial post-conviction pleading, it would be considered timely.

Recently, however, the Supreme Court held in *Charboneau v. State*, 144 Idaho 900, 904 174 P.3d 870, 874 (2007), that the analysis of "sufficient reason" permitting the filing of a successive petition must necessarily include an analysis of whether the claims being made were asserted within a reasonable period of time. In determining what a reasonable time is for filing a successive petition, the Court held that it is simply considered on a case-by-case basis, as has been done in capital cases. The Court went on to hold that the thirteen months, at a minimum, after the defendant in *Charbonneau* became aware of allegedly newly discovered evidence and filed a successive post-conviction petition was simply too long to be reasonable. *Id*.

Here, Drennon's second successive petition was filed over ten years after his conviction became final. The remittitur on his first successive petition was issued in September 2002. He did not file his second successive petition until April 2005, almost two and one-half years after the conclusion of proceedings on his first successive petition. Thus, the filing of his second successive petition was clearly outside both the general one-year parameter and the relation-back doctrine established in *Hernandez*. We next turn to whether, under the analysis of *Charboneau*, such a gap was reasonable.

Two of Drennon's claims reference the "change in the law" in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005).[2] Given that *Apprendi* and its progeny established new law in the area of sentencing after the statute of limitations had run on Drennon filing his initial post-conviction petition, it is conceivable that his delay in asserting this claim was "reasonable" under

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[2] Only his first claim specifically refers to *Apprendi* and its progeny, but his third claim--that "[h]ad the jury considered all the facts and information presented, rather than the court, Petitioner would not have received such a harsh indeterminate sentence--we interpret as merely another assertion that his sentencing was not carried out in accordance with *Apprendi*. Thus, we address both claims together.

Charboneau. However, given that the claim is without merit as the alteration in the sentencing law is not applicable to Drennon's case, we affirm the summary dismissal of this issue on an alternate ground. *Baker v. State*, 142 Idaho 411, 420, 128 P.2d 948, 947 (Ct. App. 2005).

In *Apprendi*, 530 U.S. at 490, the United States Supreme Court held that any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely*, 542 U.S. at 303, the Court held that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. *Booker*, 543 U.S. 220, applied *Apprendi* in the context of the federal sentencing guidelines. While not entirely clear from his petition, we assume that Drennon's argument is that he was sentenced in violation of *Apprendi*.

This argument, however, is meritless. In *State v. Stover*, 140 Idaho 927, 931, 104 P.3d 969, 973 (2005), the Idaho Supreme Court explicitly held that Idaho's indeterminate sentencing system, whereby defendants are sentenced to minimum and maximum terms is not in contravention of *Apprendi* or *Blakely*. We note *Stover* involved a defendant sentenced for violation of I.C. § 18-1508, the same statute which Drennon was convicted of violating. The Court concluded that Idaho's system is unaffected by the holding in *Blakeley* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment. *Stover*, 140 Idaho at 931, 104 P.3d at 973.

Here, the statutory maximum for lewd conduct is life imprisonment, which Drennon initially received before the indeterminate portion of his sentence was reduced following his Rule 35 motion. Thus, even in light of *Apprendi et al*., his sentence was not imposed in an illegal manner. Accordingly, his post-conviction petition on this issue was without merit and summary dismissal was appropriate.

The remaining issue in Drennon's second successive post-conviction petition was that "[t]he Idaho Parole Commission is depriving Petitioner parole based mainly on Petitioner's litigation practices, thus making continued confinement unreasonable." However, as we recently noted in *Drennon v. Craven*, unpublished opinion, Docket No. 33713 (February 1, 2008), Drennon has since been released on parole. Thus, he has already received the relief he sought to obtain through a favorable judicial decision on this point, and his appeal in regard to this issue is moot. *Id*.

Accordingly, since Drennon's claims regarding a change in the sentencing law have no merit and his assertion that he was wrongfully denied parole is moot, we conclude the district court did not err in summarily dismissing Drennon's second successive petition as untimely.

B. Denial of Motion for Appointment of Conflict Counsel

Drennon also claims the district court abused its discretion in denying his request for appointment of conflict counsel to assist with his second successive post-conviction proceeding. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111(2004). An indigent petitioner in a post-conviction proceeding is entitled to appointed counsel only if the petition alleges facts showing the possibility of a valid claim that would require further investigation on the defendant's behalf. *Workman v. State*, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007).

Given that Drennon's petition in regard to a change in sentencing law was meritless, we hold that Drennon did not show the "possibility of a valid claim," concerning this issue and thus he was not entitled to appointment of counsel in the first place, let alone the appointment of conflict counsel. In regard to his claim that he had wrongfully been denied parole, the issue is also moot in this context, and we will not address it on appeal Accordingly, the district court did not abuse its discretion in denying his motion for appointment of conflict counsel.

III.
CONCLUSION

The district court did not err in summarily dismissing Drennon's second successive post-conviction petition, nor did it abuse its discretion in denying his motion for appointment of conflict counsel. We therefore affirm the order of the district court summarily dismissing Drennon's second successive petition for post-conviction relief as well as the court's order denying Drennon's motion for appointment of conflict counsel.

Judge LANSING and Judge PERRY **CONCUR**.